

STATE OF MICHIGAN
COURT OF APPEALS

DEPARTMENT OF TRANSPORTATION,

Plaintiff-Appellant,

v

HAGGERTY CORRIDOR PARTNERS
LIMITED PARTNERSHIP, PAUL D. YAGAR,
Trustee, a/k/a PAUL D. YEGER, and NEIL J.
SOSIN,

Defendants-Appellees.

UNPUBLISHED

July 22, 2003

Nos. 234099;240227
Oakland Circuit Court
LC No. 95-509518-CC

Before: Owens, P.J., and Bandstra and Murray, JJ.

PER CURIAM.

In this condemnation action, plaintiff Michigan Department of Transportation (MDOT) appeals as of right from a judgment, following a jury verdict, awarding defendants \$14,877,000 as just compensation for a parcel of property that plaintiff condemned for use in the M-5 highway construction project, also known as the M-5 Haggerty Connector. The condemned property, consisting of approximately 51.26 acres, was part of a larger parcel of approximately 335 acres of undeveloped land (the “subject property”) owned by defendants. In Docket No. 234099, plaintiff argues that the jury award was based on improper considerations. In Docket No. 240227, plaintiff challenges the court’s postjudgment award of expert witness fees. We affirm in part and reverse in part.

The instant matter involved a determination of the “just compensation” for the condemned property. Defendants contended that they were not only entitled to compensation for the property actually taken, but also for the reduction in the value in the property not taken. In addition, defendants attempted to recover “cost-to-cure” damages based on their expenditures in returning the property not taken to its prior value. The jury largely agreed, awarding an amount of damages closer to defendants’ contention than plaintiff’s.

Docket No. 234099

Plaintiff challenges several of the trial court’s evidentiary decisions. We review a trial court’s evidentiary decisions for an abuse of discretion. *Dep’t of Transportation v VanElslander*,

460 Mich 127, 129; 594 NW2d 841 (1999). “An abuse of discretion exists when the result is so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion.” *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

Generally, when property is condemned, the owner is entitled to “just compensation” designed to put the property’s owners in as good a position as they would have been had their property not been taken. *Dep’t of Transportation v VanElslander*, 460 Mich 127, 129; 594 NW2d 841 (1999). However, the “public may not be enriched at the expense of the property owner, nor may the property owner be enriched at the public’s expense.” *In re Condemnation of Private Property to Acquire Land for the Detroit Metropolitan Wayne Co Airport*, 211 Mich App 688, 693; 536 NW2d 598 (1995). Where, as in this case, there is a partial taking, “it is possible for the property not taken (the remainder) to suffer damages attributable to the taking.” *Dep’t of Transportation v Sherburn*, 196 Mich App 301, 304-305; 492 NW2d 517 (1992).

Landowners in a condemnation case are entitled to an award based upon the “highest and best use of their land,” and the jury is entitled to consider every legitimate use. *Novi v Woodson*, 251 Mich App 614, 631; 651 NW2d 448 (2002), quoting *City of St. Clair Shores v Conley*, 350 Mich 458, 462; 86 NW2d 271 (1957). Any evidence that would tend to affect the market value of the property as of the date of taking is relevant, including the possibility of rezoning.¹ *VanElslander, supra* at 129. The possibility of a zoning change may not be considered, however, unless it is a reasonable possibility. *State Highway Comm v Minckler*, 62 Mich App 273, 277-278; 233 NW2d 527 (1975). Where the possibility of a zoning change is too remote and speculative, or where a private purchaser would not give substantial consideration to it, it should not be considered. *Id.*

Here, one of the primary issues for the jury to resolve was whether, at the time of the condemnation, there was a reasonable possibility that the subject property would be rezoned from residential to commercial. If not, defendants’ appraisal of the property using a non-residential “highest and best use” would have been too speculative to consider. However, if the jury found that it was reasonably possible that the subject property would be rezoned, then it could consider defendants’ appraisal of the property. Thus, the jury’s finding regarding the “reasonable possibility” of rezoning was essential to its factual determination of the subject property’s “highest and best use.” This finding, in turn, necessarily had a significant impact on the jury’s determination of which parties’ valuation more accurately reflected the subject property’s value on the date of the taking. Because the jury’s damages award was greater than plaintiff’s contention of value, the jury apparently found it reasonably possible that the subject property would be rezoned. Indeed, otherwise the jury should not have even considered defendants’ appraisal.

¹ It should be noted that, on the date of the taking, December 7, 1995, the subject property was zoned R-A (residential). The zoning classification for the area was subsequently changed in May 1998 to OST (office/service/technology).

Plaintiff contends that the trial court abused its discretion in admitting evidence that the subject property was, in fact, rezoned in May 1998—approximately 2½ years after the date of the taking.² We agree.

The subject property was to be valued “as though the acquisition had not been contemplated.” MCL 213.70(1). Plaintiff attempted to introduce evidence establishing that the subject property was rezoned because of the condemnation. If so, the actual rezoning was irrelevant. Indeed, the value of condemned property should have been determined without regard to any enhancement or reduction of the value attributable to condemnation or the threat of condemnation. *State Highway Comm v L & L Concession*, 31 Mich App 222, 226-227; 187 NW2d 465 (1971). Defendants were not entitled to the enhanced value that resulted from the condemnation project, only the value of the property at the time of taking. *In re Urban Renewal, Elmwood Park Project*, 376 Mich 311, 318; 136 NW2d 896 (1965). Although the potential for rezoning on the date of taking was properly considered, evidence of the actual zoning change was irrelevant to the value of the property on the date of taking and should not have been disclosed to the jury. Moreover, we agree with plaintiff’s contention that the evidence improperly contributed to the jury’s finding that the rezoning was reasonably possible. At the very least, the improperly admitted evidence tainted the jury’s resolution of the “reasonable possibility” question of fact. Therefore, we conclude that the trial court abused its discretion in admitting the evidence.

We reject defendants’ contention that the evidentiary error was harmless. Had the evidence not been admitted, it is unlikely that the jury would have been exposed to the evidence that defendants now claim renders the improperly admitted evidence harmless. Consequently, we deem it appropriate to reverse and remand for further proceedings.³

Despite our remand, it is prudent to address two of plaintiff’s other issues raised on appeal. First, plaintiff contends that the trial court abused its discretion in admitting evidence about the hypothetical commercial site plan for the subject property. As noted above, defendants’ valuation of the subject property was based on a “highest and best use” for non-residential purposes, even though the property was only zoned for residential purposes at the time of the taking. Accordingly, plaintiff contends that the site plan was too speculative to be considered. Again, however, the “highest and best use” may contemplate a zoning change if it is a “reasonable possibility.” *Minckler, supra* at 277. Whether defendant’s hypothetical site plan was reasonably possible or too speculative to be considered was a factual question for the jury to resolve. See *VanElslander, supra* at 132-133. Consequently, the trial court did not abuse its discretion in admitting the evidence.

Second, plaintiff contends that the trial court erred in allowing the owner to recover “cost-to-cure” damages. Although it is not entirely clear from plaintiff’s briefs, it appears it is

² Alternatively, plaintiff contends that the trial court abused its discretion in prohibiting plaintiff from introducing evidence establishing that the zoning change was caused by the condemnation.

³ In light of our ruling, we need not address whether the trial court abused its discretion in prohibiting plaintiff from introducing evidence establishing that the rezoning was caused by the condemnation.

essentially challenging the admissibility of certain valuation evidence relating to “cost-to-cure” damages.⁴ In *Sherburn*, we explained as follows:

Generally, in eminent domain cases a condemnee’s damages are measured by the fair market value of the property taken. However, where, as here, a partial taking occurs, it is possible for the property not taken (the remainder) to suffer damages attributable to the taking. These damages have been described as “severance damages,” which may be measured by calculating the difference between the market value of the property not taken before and after the taking. Where severance damages have occurred, it may sometimes prove possible for the property owner to perform certain actions upon the property to rectify the injuries in whole or in part, thus decreasing the amount of severance damages and correspondingly increasing the parcel’s market value. These actions constitute a “curing” of the defects, and the financial expenditures necessary to do so constitute the condemnee’s cost to cure.

Michigan has for many years recognized that determination of a condemnee’s cost to cure is a valid method of appraising the severance damages for which the condemnee is entitled to compensation. However, it has also been recognized that the cost-to-cure damages in a given case are not unlimited. Thus . . . our Supreme Court found improper a condemnee’s proposed award of damages consisting of the market value of the property taken, possession of the remainder property, and cost-to-cure expenses where the total damages exceeded the market value of the whole property before the taking. An owner is not to be enriched because of the condemnation. [*Sherburn, supra* at 304-306 (citations omitted).]

Indeed, we noted that an owner may only recover “cost-to-cure” damages to the extent that they do not exceed the diminution in the value of the remainder parcel. *Id.* at 306, quoting 4A Nichols, Eminent Domain (rev 3d ed) § 14.04, pp 14-97-14-98; volume 5, § 18.18, pp 18-119-18-120. In addition, cost-to-cure damages obviously may not exceed the total value of the property before the taking. *Id.* at 307. In fact, the total damages award may not exceed the total value of the property before the taking.⁵ *Id.* at 306.

Here, defendants’ valuation expert did not assign a value to the remainder parcel. Thus, the jury could not have relied on defendant’s valuation of the property to calculate the

⁴ Although plaintiff’s reply brief expressly states that it is not challenging the admissibility of any evidence, it is not clear what, if any, remedy plaintiff is seeking.

⁵ It should be noted that *Sherburn* “distilled” the above rules into two formulas. *Sherburn, supra* at 306. However, when compared to the text surrounding the formulas, it is plainly apparent that the *Sherburn* formula for severance damages contains two mistakes. First, the “formula” improperly substituted “the market value of the remainder after the taking” for the diminution in value of the remainder. See *id.* at 304-306. Second, the “formula” suggests that the “cost-to-cure” damages should be added to “the diminution in value of the remainder,” whereas the proper rule—explained elsewhere in the decision—is that the “cost-to-cure” damages are a substitute for the “diminution in value.” Rather than relying on the erroneous “formula,” we instead apply the text that led to, but was improperly summarized in, the formula.

diminution in value of the remainder parcel, nor could it have determined whether the “cost-to-cure” damages properly did not exceed the diminution in value. Therefore, to whatever extent that the jury awarded “cost-to-cure” damages, these damages could not have exceeded plaintiff’s evidence regarding the diminution in value. Accordingly, there is merit to plaintiff’s contention of error. However, in light of our remand, we decline to fashion a remedy for this error and instead caution the parties to avoid repeating this error during any future proceedings below.

Nevertheless, having concluded that the trial court abused its discretion in allowing defendants to introduce evidence that the subject property was rezoned, we reverse the judgment and remand the matter for further proceedings.

Docket No. 240227

Plaintiff contends that the trial court improperly awarded expert witness fees for defendants’ experts. However, there is a possibility that our remand will impact these awards. Accordingly, we conclude that it is appropriate to defer considering the propriety of these awards until the trial court proceedings are resolved. Consequently, we decline to consider the issues raised in docket no. 240277.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Donald S. Owens

/s/ Richard A. Bandstra